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No. 738.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

T. LAMAR CAUDLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

Of Order Denying Petition for Writ of Certiorari.

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To the Honorable Earl Warren, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that this Court grant a rehearing of its order of March 31, 1958, denying his petition for certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above entitled case, as prayed for in the petition filed on January 23, 1958.

QUESTIONS PRESENTED.

1. Whether the Fifth Amendment will permit a federal trial judge to conceal from the defendants before, during and after said trial that said judge is severely depressed mentally so that psychiatric care is necessary and, further, that the condition of said judge is serious enough to warrant the administration of electric shock treatments, that a hypnotic drug, Paraldehyde, is administered instead in increasing doses throughout the trial, that the judge himself is fearful that "something has gone wrong with his brain" and that the drug "may have affected his mentality"; petitioner urging that a judge in such a condition has a duty to warn the parties of his condition so that the parties, if they desire, may challenge his competency to serve as trial judge in one of the most controversial trials of a decade.

2. Whether the Fifth Amendment will permit a federal court to place upon a defendant in a criminal trial the burden of proving that two jurors who acted dishonestly in failing to answer truthfully material questions propounded by the trial judge on *voir dire* (also did additional dishonest acts which were prejudicial to petitioner), the falseness of said jurors' original answers having been proved.

3. Whether the Fifth Amendment and concepts of fundamental fairness will permit the admission into evidence of portions of a defendant's files when such files were obtained from the defendant after the indictment naming him defendant had already been drafted, this fact being known to the prosecutor and concealed from this petitioner. The material obtained was prejudicial to the petitioner in view of the construction placed thereon by the prosecution.

4. Whether a successor judge who succeeds to the duties of a trial judge upon the suicide of the trial judge has not,

as a matter of law, abused his discretion in (1) failing to grant a new trial in a case where vital motions remain undecided after a trial of 37 days, 72 witnesses, and 200 exhibits and (2) in the alternative, whether, upon deciding to render a decision in the case, failed to rule on vital motions expressly reserved by the now-deceased trial judge.

5. Whether, if no one error be sufficient to justify the granting of this petition, the cumulative effect of the many errors denies petitioner due process of law and deprives him of his constitutional right to a fair and impartial trial.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

PLACING THE ISSUES IN PROPER CONTEXT.

Petitioner's conviction represents the fulfillment of the 1952 campaign promise to "clean up the mess in Washington." And the political overtones of this trial cannot be ignored by this court. Since little of the evidence in this record is competent as to this petitioner, the conspiracy statute was invoked with its latent dangers to individual freedom. The trial was scheduled to begin two months before the National Party Conventions met to select presidential candidates. The jurors retired to their jury room less than one month before one of the conventions assembled. In the politically superheated air of St. Louis adverse publicity concerning defendants was circulated by all the organs of mass communication. This trial was "to determine the future course of the scandal investigations." From reading the reams of publicity in this record, one could almost assume that the jurors had a public duty to convict.

Into this maelstrom petitioner was thrown. The following facts were forgotten: As Assistant Attorney General,

petitioner had administrative discretion to prosecute or to decline prosecution. The maligned "health policy," instituted by his predecessors, was one standard to guide these decisions. Petitioner's decision based on the opinions of eminent psychiatrists, met the approval of his subordinates. Federal Judge Harper, describing the case as "the most complicated medical problem of any case that I ever had before me," gave judicial recognition to the correctness of petitioner's decision. And though the Court of Appeals stated that petitioner received "substantial profits," even that court cannot alter the facts admitted by the government—*petitioner did not receive one cent.*

I. The Silent Prosecutor.

On November 22, 1955, the government prosecutor drafted the indictment naming petitioner as defendant. The following day, petitioner turned over his private files to government agents not knowing that his indictment had been drawn. Portions of these files were admitted into evidence over the timely objections of petitioner. The Court of Appeals, though the issue was raised before them at length, failed to discuss the use of this evidence.

Petitioner was familiar with the ordinary practice of government prosecutors before grand juries. This knowledge, relied upon by the government to prove that petitioner was adequately appraised of his rights, actually worked to his disadvantage for petitioner was familiar with the duty of the prosecutor to warn potential defendants as to their status before the grand jury. Mistakenly, petitioner understandably felt that he could rely upon the government to treat him fairly.

Unknown to defendant he became a potential defendant possibly as early as November 18, 1955. There is no question however about the date of the drafting of the indictment, November 22. On that date petitioner, for all prac-

tical purposes, was no longer a potential defendant. When we consider the power of the government before a grand jury, we must realize that petitioner was on that date an actual defendant.

As the prosecutor well knew, once the petitioner was informed as to his status, the government would lose all chance of procuring these papers. Therefore, the prosecutor decided to conceal the fact from the petitioner. Concealing this vital fact as to petitioner's status amounts to obtaining his papers by the misrepresentation of a material fact.

Constitutional rights can only be exercised by a person cognizant of his peril. Once his indictment was drafted, his status was radically altered. His danger was greatly increased. In such a situation petitioner was at the mercy of his government. No quarter was given. The fact remained concealed. The over-zealous prosecutor who remained silent was Wyllis Newcomb whose actions before another federal grand jury came "perilously close to being a fraud on the jurisdiction of this court". Brown v. United States, 245 F. 2d 549, 553 (8 C. C. A., 1957).

Surely the government with its limitless resources owes the simple ethics of fundamental fairness to those citizens whom it would prosecute. The Eighth Circuit failed to discuss this matter. Surely the admission of this tainted evidence condones the actions of a prosecutor whose conduct poses a new and substantial question directly affecting the administration of criminal justice in the federal courts.

II. **The Silent Jurors.**

The Court of Appeals has decreed the unique rule that even after petitioner has proved that jurors who sit in judgment upon him have testified falsely as to their political affiliations, the petitioner must further bear the burden

of proving additional acts of dishonesty by these jurors before he may show prejudice.

The allocation of the burden of proof is often decisive. In this case the burden is impossible to sustain unless petitioner is fortunate enough to receive a confession from the silent jurors to additional acts. Should this case go unreversed, jurors may remain silent on *voir dire* with no prejudice attached to their actions. And defendants will ponder the value of challenges when they know that this court permits jurors to conceal material facts.

The courts below advance the following argument to justify their position: " . . . this court has no right to assume that in this trial jurors of Republican affiliation would be prejudicial to these defendants . . . " Would those lower courts also assume no prejudice even though certain jurors concealed their Republican affiliations from the questions of the trial judge? And yet that is what the court says even though any juror who admitted political affiliation and activity was struck by either the defendants or the governments.

To force petitioner to prove additional dishonest acts on the part of these jurors misplaces the burden. In a similar situation this court said: " . . . The Court below affirmed, however, because petitioner had failed to prove some particular act . . . and the State argues that it is petitioner's burden to fill this 'factual vacuum.' We cannot agree. If there is a 'vacuum' it is one which the State must fill," Avery v. Georgia, 345 U. S. 559, 562, 97 L. ed. 1244, 73 S. Ct. 891.

Surely this Court will require as high a standard of conduct in the federal courts as *Avery* demands of the states. Because those jurors were silent petitioner was deprived of his right to challenge.

III. The Silent Judge.

Although the right to challenge jurors is valuable, it is no more precious than the right to challenge the competency of the judge who shall hear your case. This right, however, is also useless without having adequate facts upon which to base a timely challenge. If these facts are locked within the bosom of the court, petitioner is helpless.

During this long, arduous trial, the late Rubey Hulen was a desperately ill man. His bodily ills posed no danger to the administration of criminal justice. Such cannot be said of his mental ills.

This subject is distasteful to petitioner because Rubey Hulen may no longer defend himself. Yet petitioner is *in extremis*. Plain words must be used.

Judge Hulen was under the care of a doctor and a psychiatrist during this trial. The fact of his illness and its nature were not revealed to petitioner until six months after the judge's death. The information, in the form of affidavits, was presented to the successor judge the day before sentence was passed. Consequently the questions there raised have never been fully explored.

The following excerpts from the affidavits of the two doctors are eloquent:

The Psychiatrist:

> ". . . Approximately three weeks before the beginning of the trial of the Connelly-Caudle case Judge Hulen again consulted me saying that he had a recurrence of his inability to sleep and was again in a depressed mind. I renewed the medication but during the course of time more and more medication was required for him to get adequate rest. He was taking Paraldehyde, a liquid sedative, that carries with it

some odor that is discharged through the lungs. As the trial progressed it was necessary for the judge to take more and more of this medication and the amount that he was taking began to worry him, first, because he feared it would effect his mental capacity, . . . He construed to be in a state of melancholy and had he not been in daily sessions in the Court which required his constant presence, I would have considered prescribing electric shock treatments for him, which, in my opinion, would have calmed him down and reduced his depression substantially and permitted him to do his work comfortably in a normal manner. However, electro therapy involves temporary loss of memory . . . Therefore, he was continued on the liquid medication in rather heavy doses in an attempt to tide him over until the pressure of this trial abated. . . .

After the trial was completed it was concluded between Dr. Kountz and myself that Judge Hulen should be hospitalized and a date was set for him to enter Barnes Hospital . . . He was scheduled to enter the hospital on the day that the fatal bullet was inflicted . . .

It is my professional opinion that during the period that covered the trial of this case that Judge Hulen's emotional state was such as to make him somewhat indecisive and perhaps his medication would have impaired his judgment to some degree on one day or another during that period . . ."

The Doctor:

". . . after the trial was over I was concerned about his depressed state of mind, and in consultation with Dr. Haddock, agreed that the judge should be hospitallized and should, if possible, be persuaded to take electric shock treatments to relieve his tension. . . . He was already fearful that something had gone wrong with his mind and that possibly the liquid medication

given him by Dr. Haddock had already done injury to him. . . . On the Sunday before Saturday that he was to enter the hospital, I went by Judge Hulen's home to invite him to accompany me on a visit out to my farm. He said he could not go for he was having difficulty in preparing an opinion in the Connelly-Caudle case. He stated that he was having great difficulty in concentrating and bringing his pencil down to the paper to write the opinion that was expected of him and complained that the medication had in some way affected his mentality. . . ."

In the ordinary case facts such as these might not prove decisive. But one of the largest issues in the trial before Judge Hulen was the mental health of the taxpayer Sachs. Thousands of words of medical testimony described minutely his fits of depression and his suicidal tendencies. Deep in his leather chair, Judge Hulen listened . . . listened to symptoms quite like his own. Unknown to everyone else in that courtroom, Judge Hulen was listening to a partial analysis of his own condition. His heart and brain must have recoiled throughout that agonizing task.

Judge Hulen could have mentioned his desperate mental plight to counsel. Yet he remained silent. The muffled report of a pistol brought him peace.

It is obvious that had either the government or petitioner known of the Judge's condition, serious consideration would have been given to challenging his competency to sit in this controversial trial. Perhaps then Rubey Hulen would be alive today. No one can say with certainty what effect his illness had upon his discretion and judicial temperament. And to say that the printed record is ample protection of petitioner's rights is to beg the question. Sitting in judgment is difficult enough with a sound mind. And to force petitioner to prove, in the face of these affidavits, that the illness of the judge prejudiced him is again

imposing an impossible burden. Surely the Constitution guarantees this defendant the right to be heard by a judge in full possession of his mental faculties.

IV. The Unhearing Judge.

Petitioner feels justified in raising this issue because of certain statements made by the Successor Judge, Gunnar Nordbye, in U. S. v. Shotwell Manufacturing Company, received after the Petition for Certiorari was filed. The case is cited in 58-1 U. S. T. C., Paragraph 9257 (C. C. H. Advance Sheets—U. S. Tax Cases—February 12, 1958). Petitioner would like to adopt as his own argument the following words by Nordbye, J.:

> " ' . . . But, just because his (trial judge) fact-finding is based on his estimates of the witnesses, of their reliability as reporters of what they saw and heard, it is his duty, while listening to and watching them to form attitudes toward them. He must do his best to ascertain their motives, their biases, their dominating passions and interests, for only so can he judge of the accuracy of their narrations. He must also shrewdly observe the stratagems of the opposing lawyers, perceive their efforts to sway him by appeal to his predelictions. He must cannily penetrate through the surface of their remarks to their real purposes and motives . . . If the judge did not form judgments of the actors in those courthouse dramas called trials, he could never render decisions. Frank, J.—In Re Linahan, 138 F. 2d 650, 653.' "

To quote these words by the late Jerome Frank after attempting to rule on a cold record of 37 days, 72 witnesses and 200 exhibits shatters the faith of petitioner.

V. The Silent Schwimmer.

From October 26, 1949, the date the petitioner first met Harry I. Schwimmer until he left Washington he never conferred with him alone.

The suspicion against the petitioner is engendered because of the efforts of Schwimmer to sell petitioner a fractional mineral interest for $750.00, the title to which was recorded in petitioner's name without his knowledge in the State of Oklahoma.

Insulted by this familiarity Schwimmer was severely rebuked and condemned. An apology admitting his error and the promise that he would correct the mistake he personally made seemed sufficient in the judgment of the petitioner. No gift was offered, only an effort to sell, which was not acceptable.

Many promises were made by Schwimmer resulting from many long distance telephone calls demanding a deed to sign to sever title from petitioner's name, his continued illness and confinement to his home because of angina pectoris, his acceptance of full responsibility for his mistaken efforts to sell petitioner and the fact that his introduction to the petitioner stemmed under the highest auspices an attorney could have, confused and confounded the petitioner no end until the day he received the long sought deed to sign in April, 1951, which was promptly executed by the petitioner and his wife, air mailed within 40 minutes from its reception where title has vested from that time until now in the name of Schwimmer and his wife.

Other than the serious illness of the taxpayer Sachs as disclosed by five long affidavits of eminent physicians of St. Louis, none known to the petitioner, and relying upon the Assistant Superintendent of St. Elizabeth Hospital and his staff of senior psychiatrists to guide him and his staff, as consultants, and Schwimmer's unsuccessful efforts to

sell some kind of an interest to the petitioner, was the extent of knowledge that the petitioner had of Schwimmer's activities.

Not until 3 years 7 months and 21 days later was he apprised to some extent of the activities of Schwimmer when the petitioner was before the grand jury and 17 court trial days when Schwimmer's unethical practices were proven by witnesses hundreds of miles removed from where the petitioner lived. As to all of these activities, none ever known to the petitioner, the silent Schwimmer has remained silent.

His heart attack in the court room, Judge Hulen's open reluctance to grant Schwimmer a mistrial until a reputable physician, appointed by him, swore under oath that to force his presence further would probably result in Schwimmer's death, left the petitioner in a hiatus state then as he is now because of the silence of the only one who caused the gross humiliation borne by him and his family.

The silence of this man, barely known to the petitioner, his proven lies and silent activities, never explained by him or by any person for him, and the lack of knowledge of all until confronted with it during the trial, is a plague upon the house of the petitioner.

His whereabouts have not been known to the petitioner since his stumbling departure in the aisle of the court room before the public and the jury the day the mistrial was granted.

This court should recognize the latent dangers all public officials are plagued with by characters of this type whose silent, unknown activities, if known, would have altered the course taken by the petitioner.

To this very hour, having spawned the specter he alone created, he remains silent wherever he is.

VI. The Plimsoll Line of Due Process.

This tragic trial has been marked by the following unusual circumstances: a prosecutor silent as to material facts; two jurors silent as to material facts; a judge silent as to his serious mental illness; the broad sweep of the conspiracy statute; the heart attack of defendant Schwimmer in the courtroom and his departure, leaving petitioner with the burden of explaining away evidence incompetent as to him and unknown to him prior to the trial; the admission of ambiguous, poisonous Exhibit 100J, a piece of evidence that the trial judge refused to admit five times before yielding on the sixth; the trial judge allowing petitioner only two hours to argue his case before the jury after 37 days of trial; the express reservation of motions by the trial judge; the successor judge failing to rule on these motions; the death of petitioner's chief counsel; the disclosures by the doctors of statements by the dead judge; the successor judge ruling as an appellate court; the successor judge seeing petitioner for the first time in passing sentence; the appellate court stating several times that petitioner received substantial profits when the government admits he received nothing; the Court of Appeals failing to mention the eminent psychiatrists and the federal judge who supported petitioner's honest decision not to prosecute because of the taxpayer's health condition.

If there be a Plimsoll Line of due process, surely petitioner's craft is heavily laden. Never have so many strange happenings occurred during the course of a single trial. Their cumulative effect cannot justly be ignored. Fikes v. Alabama, 352 U. S. 191, 199 (1957), 1 L. ed. (2d) 246, 77 S. Ct. 281.

CONCLUSION.

Petitioner hereby formally adopts as his own and incorporates by reference the Petition for Rehearing filed by Matthew Connelly.

For the reasons contained in this petition and in the petition filed by Mr. Connelly, petitioner prays this Court to grant this Petition for Rehearing.

Respectfully submitted,

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